2013 IL App (3d) 120671-U

Order filed December 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

VICTORIA SENOR, Plaintiff-Appellant, v. DEPARTMENT OF HUMAN SERVICES, STATE OF ILLINOIS; CIVIL SERVICE COMMISSION, STATE OF ILLINOIS, Defendants-Appellees.	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois Appeal No. 3-12-0671 Circuit No. 11-MR-290 Honorable Adrienne W. Albrecht, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Wright and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Civil Service Commission's finding that the plaintiff was sleeping on duty on October 6, 2010, was not against the manifest weight of the evidence; and (2) the Commission's approval of the plaintiff's discharge was not arbitrary, unreasonable, or unrelated to her work where the defendant's personnel policy provided that sleeping on the job a second time was cause for discharge and where the plaintiff was responsible for watching over mental patients who had a history of harming themselves.

¶ 2 Plaintiff Victoria Senor (Senor), a mental health technician with the Department of Human Services (the Department), filed a complaint for administrative review of the decision of the Illinois Civil Service Commission (the Commission) approving her discharge from the Shapiro Developmental Center (Shapiro). The Department charged Senor with sleeping on duty on two separate occasions, once on October 3, 2010, and again on October 6, 2010. The Commission found that the charges were proven and warranted Senor's discharge. The trial court affirmed the Commission's decision. This appeal followed.

¶ 3 FACTS

¶ 4 Senor has worked at Shapiro since 1986. For much of that time, and at the time of her discharge, she was employed as a Mental Health Technician II. Her duties including monitoring and interacting with the residents to whom she was assigned, keeping those residents safe and in good health, and reporting any changes in their health or behavior. Senor worked the midnight shift, usually from 11:00 p.m. to 7:00 a.m.

¶ 5 On October 2-3, 2010, Senor was assigned to care for V.W., a resident who engaged in severely self-injurious behavior which had required him to undergo surgery on at least one occasion. Under the individual support plan that the Department had developed for V.W.'s care, V.W. was to receive continuous one-on-one supervision by Shapiro staff and a care giver was to be within arm's reach of him at all times, including while he slept.

¶ 6 Jerina Ndlovu-Francois (Francois), a registered nurse and supervising shift coordinator at Shapiro, testified that, on October 3, 2010, at about 1:55 a.m., she saw Senor sitting in a chair in V.W.'s room with one of her legs propped up on another chair, her arms crossed over her chest, her head down, and her eyes closed. Francois testified that Senor appeared to be sleeping. When

Francois knocked on the door and called Senor's name, Senor did not respond. Francois called Debra Moore, Senor's supervisor, who came to V.W.'s room and looked inside. Moore testified that she saw Senor sitting with her eyes closed and that she appeared to be sleeping. After Moore arrived, Francois entered the room and called Senor's name more loudly, at which point Senor opened her eyes and stretched. Senor apologized to Francois and told her that she was taking an antibiotic that made her tired. During her subsequent testimony, Senor did not deny that she had been sleeping when Francois confronted her on October 3, 2010. In fact, she admitted that she "had to be" asleep at that time because Francois had startled her.

¶ 7 On October 4, 2010, Moore told Senor that she had been instructed to write up a memorandum regarding the incident. Senor testified that she knew that Moore was writing up a statement based on what she had observed on October 3, 2010. However, Senor testified that she did not understand that Moore's written statement might be associated with disciplinary action. Senor claimed that Francois did not tell her after the October 3, 2010, incident that she would be disciplined for sleeping on duty.

¶ 8 On October 6, 2010, Senor was assigned one-on-one supervision of V.W. during the midnight shift. At approximately 1:45 a.m., Francois looked into V.W.'s room as she made her unit rounds. She saw Senor sitting in her room with one of her legs on another chair, arms folded across her chest, head down, and eyes closed. Francois testified that Senor appeared to be sleeping. Francois stated that she knocked on the door and called Senor's name, but Senor did not answer. Francois called shift charge nurse Jackie Anderson to the room. After Anderson arrived, Francois knocked on the door again, entered V.W.'s room, and called Senor's name a few more times. Francois testified that Senor told her that she did not realize that she had been asleep

and that her medication was making her tired. Francois reported the incident to the administrator on call and wrote up a report of the incident.

¶ 9 During the Commission hearing, Senor denied that she was sleeping when Francois confronted her in V.W.'s room on October 6, 2010. She testified that she had her eyes shut and was listening to music at the time. She claimed that she had her eyes shut because she had a bad headache. She stated that, on October 3, 2010, she had stopped taking the medication that was making her sleepy, and she was having severe headaches as a result.

¶ 10 The Department's general personnel policy for Shapiro includes a rule prescribing discipline for sleeping on duty. The rule states: "Sleeping on Duty – First time – 15 day suspension; second offense is cause for discharge." Senor received and signed a copy of the Department's general personnel policy in March 2009. Senor testified that, on October 3, 2010, she was aware that the Department's rule prohibiting sleeping on duty provided for a 15-day suspension for a first violation, and that a second violation was cause for discharge.

¶ 11 Donna Leinart, the Department's Human Resources Director for Shapiro, testified that the Department considered the October 3 and October 6 incidents to be separate infractions. She stated that the rule against sleeping on duty does not provide for grouping separate incidents into a single infraction, and she claimed that the Department consistently imposes a 15-day suspension for the first incident and discharge for the second incident. According to Leinart, the "first time" language of the rule meant the first incident of sleeping, not the first time discipline was imposed for the violation. Leinart also testified that a pre-disciplinary hearing for a rule infraction requires three days notice to the employee and her union. Leinart stated that the Department did not impose a 15-day suspension on Senor after her first infraction because there

was not enough time to process disciplinary paperwork for the October 3 incident before the second incident occurred on October 6.

¶ 12 The ALJ issued a recommended decision concluding that the Department had proved that Senor had violated its policy against sleeping on duty on two occasions. Although there was conflicting testimony regarding the October 6, 2010, incident, the ALJ found that Francois's consistent, "clear and concise" testimony was more likely true that Senor's "self-serving" testimony. The ALJ found that Francois's description of the several attempts it took to rouse Senor on October 6, 2010, supported the finding that Senor was sleeping rather than resting with her eyes closed. Moreover, the ALJ noted that there was no evidence that Francois was biased against Senor.

¶ 13 The ALJ also concluded that discharge was the appropriate discipline. The ALJ rejected Senor's argument that she could not be disciplined for the second incident because she had not yet been disciplined for the first incident. He concluded that such an approach would give employees a free pass to sleep on duty before the disciplinary process was completed. The ALJ also found that there was insufficient proximity in time to consider the two incidents as a single infraction. Although he acknowledged that Senor's performance evaluations indicated acceptable performance of her job, the ALJ found that discharge was appropriate because Senor's sleeping on duty compromised the Department's care plan for V.W.

¶ 14 The Commission subsequently found that the charges were proven and warranted discharge, and it affirmed and adopted the ALJ's recommended decision. Senor sought administrative review of the Commission's decision in the circuit court of Kankakee County, which affirmed the Commission's decision. This appeal followed.

¶ 15 ANALYSIS

¶ 16 In this appeal, Senor argues that: (1) the Commission's finding that Senor was sleeping on duty on October 6, 2010, was against the manifest weight of the evidence; and (2) Senor's discharge was improper and unreasonable because the Department's policy regarding sleeping on duty required progressive disciple and mandated that the two incidents alleged in this case be treated as a single offense. We disagree.

¶ 17 Judicial review of an administrative agency's decision regarding discharge is a two-step process. First, the court must determine if the agency's findings of fact are contrary to the manifest weight of the evidence. *Department of Mental Health and Developmental Disabilities v. Civil Service Comm'n*, 85 Ill. 2d 547, 550 (1981). "The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3-110 (2010). Accordingly, an agency's factual findings may be overturned only when they are against the manifest weight of the evidence (*Department of Mental Health*, 85 Ill. 2d at 550), *i.e.*, only when "an opposite conclusion is clearly evident from the record" (*Blunier v. Board of Fire and Police Commissioners of the City of Peoria*, 190 Ill. App. 3d 92, 101 (1989)). In other words, a factual finding can be reversed "only when, after viewing the evidence in a light most favorable to the agency, the court determines that no rational trier of fact could have agreed with the agency's decision." *Id.* "[W]e will not find a factual determination to be against the manifest weight of the evidence unless there is a complete absence of facts in the record supporting the conclusion reached." *Ross v. Civil Service Comm'n of Cook County*, 250 Ill. App. 3d 597, 601 (1993); see also *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992) (ruling that "[i]f the record contains evidence to support the agency's

decision, it should be affirmed").

¶ 18 The second step in the court's analysis is to determine if the agency's findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge does or does not exist. *Department of Mental Health*, 85 Ill. 2d at 551. "Cause" for discharge has been judicially defined as "some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for his no longer holding the position." *Id.* The agency's decision as to cause is entitled to deference and will not be reversed unless it is "arbitrary, unreasonable, or unrelated to the requirements of service." *Id.*; see also *Ross*, 250 Ill. App. 3d at 600. Such deference is appropriate because "the Commission, rather than the judiciary, is better able to determine the effect that an employee's conduct will have on the proper operation of his or her department." *Ruffin v. Department of Transportation*, 101 Ill. App. 3d 728, 733 (1981). Accordingly, the question for a reviewing court is not whether it "would decide upon a more lenient sanction than discharge were it to determine initially what discipline would be appropriate." *Sutton v. Civil Service Comm'n*, 91 Ill. 2d 404, 411 (1982). Rather, the question is "whether, in view of the circumstances presented, th[e] court can say that the *** Commission, in opting for discharge, acted unreasonably or arbitrarily or selected a type of discipline unrelated to the needs of the service." *Id.*

¶ 19 In this case, the Commission's finding that Senor was sleeping on duty on October 6, 2010, was not against the manifest weight of the evidence.[1] Francois testified that, on October 6, 2010, she saw Senor sitting in a chair in V.W.'s room with her leg propped up on another chair,

[1] Senor concedes that she was discovered sleeping on duty on October 3, 2010.

her arms crossed over her chest, her head down, and her eyes closed. Francois knocked on the door and called Senor's name, but Senor did not answer. Francois knocked again, entered the room and called Senor's name, at which point Senor opened eyes. Francois testified that Senor told her that she was taking medication that made her tired and she did not realize she was asleep. During her testimony, Senor denied that she was asleep and claimed that her eyes were closed because she had a headache. The Commission found Francois's testimony credible and chose to credit Francois's testimony over Senor's. It is the Commission's province to evaluate the credibility of witnesses and to resolve any conflicts in the testimony, and the Commission's credibility determinations will not be disturbed on judicial review. See, *e.g.*, *In re Austin W.*, 214 Ill. 2d 31, 56 (2005); *Illinois Department of Human Services v. Porter*, 396 Ill. App. 3d 701, 723 (2009); *Paxton-Buckley-Loda Education Ass'n, IEA-NEA v. Illinois Educational Labor Relations Board*, 304 Ill. App. 3d 343, 350 (1999).

¶ 20 Senor notes that the Department failed to call shift charge nurse Anderson as a witness even though Francois testified that she "called [Anderson] over" when she discovered Senor sleeping on October 6, 2010. Senor argues that the Commission should have applied the "missing witness rule" and presumed that Anderson's testimony would not have supported Francois's account of the incident. We disagree. The decision whether to apply the "missing witness rule" and to draw an adverse inference against a party for its failure to call a witness within its control is within the sound discretion of the Commission. *Paxton-Buckley-Loda Education Ass'n*, 304 Ill. App. 3d at 351; *Szkoda v. Illinois Human Rights Comm'n*, 302 Ill. App. 3d 532, 544 (1998); see also *Schaffner v. Chicago & North Western Transportation Co.*, 129 Ill. 2d 1, 22 (1989). Here, Francois did not testify that Anderson entered V.W.'s room or actually

saw Senor sleeping. She merely claimed that she called Anderson over to her after she knocked on the door the first time. It is not clear from Francois's testimony whether Anderson was in a position to corroborate or contradict anything that Francois saw when she entered the room. Accordingly, the Commission did not abuse its discretion when it chose not to draw an adverse inference against the Department. We also hold that the Commission's finding that Senor was sleeping on duty on October 6, 2010, was supported by Francois's testimony and was not against the manifest weight of the evidence.

¶ 21 Moreover, the Commission's approval of Senor's discharge was not arbitrary, unreasonable, or unrelated to her work. The Department's personnel policies for Shapiro provide, in relevant part: "Sleeping on Duty - First time - 15 day suspension; second offense is cause for discharge." Senor argues that this rule requires progressive discipline and that the Department could not discharge her for the second offense of sleeping on duty because it had not yet suspended or otherwise disciplined her for the first offense. However, nothing in the rule requires this interpretation. Rather, by its plain terms, the rule simply provides that an employee may be discharged for a second offense. It imposes no qualifications or conditions on the Department's right to discharge an employee for a second offense. Specifically, it does not state or suggest that a second incident of sleeping on the job may not be considered a "second offense" under the rule until the Department disciplines the employee for the first offense, conducts a pre-disciplinary hearing for the first offense, or notifies the employee of its intent to do so. Based on the plain language of the rule, the Commission reasonably concluded that there was cause for discharging Senor.[2]

[2] Senor's reliance on *People v. Damkroger*, 408 Ill. App. 3d 936 (2011) to support her

¶ 22 Moreover, because Senor was responsible for watching over a mental patient who had a history of harming himself, Senor's sleeping on the job could have had disastrous consequences. See *Hardaway v. Civil Service Comm'n*, 52 Ill. App. 3d 494, 99 (1977) (affirming the Commission's discharge of a mental health supervisor for sleeping on duty and ruling that "[d]iscipline in work is especially important where one is entrusted with the care of mental patients" and that "[a] lack of alertness caused by sleeping on duty could possibly be the major cause of a tragedy that, but for the sleeping, could have been averted.").

¶ 23 Thus, although there may have been some mitigating factors in this case (*e.g.*, Senor's good employment record), the Commission's conclusion that Senor's misconduct established cause for termination was certainly not "arbitrary," "unreasonable," or unrelated to the plaintiff's work. We will not second-guess the Commission's weighing of the evidence and its finding of cause for discharge.

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argument for the necessity of progressive disciple is misplaced, as *Damkroger* rests on specific language contained in a different statute which is not at issue here. In any event, Senor's claim that she was unaware that discipline would have resulted from the first offense is unavailing, and the Commission was entitled to reject it. Senor admitted that, prior to the first offense, she had received and signed a copy of the Department's personnel policy, which included the rule prohibiting sleeping on duty. She also testified that she knew that the rule provided for a 15-day suspension for a first offense and that a second offense could result in termination. Moreover, she testified that, two days before the second offense, she knew that her supervisor had been instructed to write up the first offense.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, we affirm the judgement of the circuit court of Kankakee County, which confirmed the Commission's decision.

¶ 26 Affirmed.